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February 24, 2006

VIA EMAIL AND STANDARD MAIL

Ms. Sally Butts, Project Manager
U.S. Fish and Wildlife Service
510 Desmond Drive SE, Suite 102
Lacey, WA 98503

Ms. Laura Hamilton, Project Manager,
National Marine Fisheries Service
510 Desmond Drive SE, Suite 103
Lacey, WA 98503

Re: Notice of Availability; Final Environmental Impact Statement for the Forest and Fish Habitat Conservation Plan

Dear Ms. Butts and Ms. Hamilton:

On January 27, 2006, the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, "the Services") published a notice announcing the availability of a final Environmental Impact Statement ("FEIS"), final Habitat Conservation Plan ("HCP"), and final Implementing Agreement ("IA") related to an application by the state of Washington for Endangered Species Act ("ESA") Incidental Take Permits ("ITPs"). *See* 71 Fed. Reg. 4609 (January 27, 2006). In accordance with Council on Environmental Quality regulations, the Washington Forest Protection Association ("WFPA") offers the following comments and information on the FEIS and related documents for inclusion in the administrative record for this proceeding. *See* 40 C.F.R. § 1503.1(b)(permitting parties to comment on FEIS prior to final agency decisions).

WFPA is an association of private, commercial forest landowners in Washington. WFPA members own and manage about half of the private forestland in the State. WFPA works for balanced public policy so that its members can continue to practice forestry that is economically sound and environmentally sensitive. Consistent with this philosophy, WFPA has supported development of the Forest and Fish Program since its inception, and believes this program reflects a reasonable balance of environmental values and economic considerations.

WFPA supports the Services' adoption of the Preferred Alternative contained in the FEIS and the Services' issuance of the proposed ITPs. WFPA commends the Services for the comprehensive analysis contained in the FEIS, particularly in view of the scope and complexity of the proposed ITPs. WFPA believes the FEIS reflects a thoughtful analysis of opposing comments, and satisfies the Services' obligations to take a "hard look" at the environmental impacts of proposed ITP issuance.
WFPA offers the following additional comments and information in response to the Services' response to public comments:

I. Compliance with the National Historic Preservation Act

In responding to comments on the Service's obligations under the National Historic Preservation Act ("NHPA"), [1] several commenters suggest that the Services' issuance of ITPs constitutes an "undertaking" as that term is defined under the relevant NHPA regulations,[2] and is thus subject to the requirements of the NHPA. *See* FEIS Responses to Comments at 3-277. The commenters go on to state that all [private] lands to which the ITPs apply must be subjected to an NHPA consultation process. *Id.*

While FWS appears to agree that issuance of the proposed ITPs constitutes an undertaking under the NHPA,[3] WFPA believes that legal arguments exist to the contrary, particularly in the case of programmatic ITPs such as those contemplated in this case. The NHPA imposes obligations on federal agencies only - it imposes no obligations on state governments. *See Lee v. Thornburgh*, 877 F.2d 1053, 1056 (D.C. Cir. 1989). Where conduct of an action is neither funded by *nor dependent upon* federal approval, no

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[1] The NHPA provides in pertinent part:

> The head of any Federal agency having direct or indirect jurisdiction over a *proposed Federal or federally assisted undertaking* in any State ... shall, prior to the approval of expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure or object that is included in the National Register.

16 U.S.C. § 470f (emphasis added). Thus, under the terms of the statute, the Services' obligations under the NHPA are triggered upon a threshold determination that the federal action in question constitutes "an undertaking."

[2] The term "undertaking" has been defined in NHPA regulations to mean "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." *See* 36 C.F.R. § 800.16(y). The Services retain the authority to determine if a particular action constitutes an undertaking, and thus requires compliance with NHPA procedures. *See* 36 C.F.R. § 800.3(a).

[3] On August 24, 2005, FWS issued a guidance document concluding that issuance of *any* incidental take permit under ESA Section 10(a)(1)(B), regardless of scope or activities covered, constitutes a federal undertaking. *See* http://www.fws.gov/historicPreservation/crp/attachment.doc. WFPA believes this informal guidance document is arbitrary and capricious as it contains no legal analysis explaining FWS' conclusion, nor was the public afforded an opportunity to review and comment upon this document prior to its release. While this guidance document was adopted by FWS, it does not appear that NMFS has taken a position on the application of NHPA to ESA Section 10 permits.

federal undertaking exists. *Id.* at 1057 (emphasis added). Furthermore, where federal agencies lack authority when approving a license to provide meaningful review of both historic preservation and community development goals, NHPA obligations do not apply. *See Vieux Carre Proprety Owners v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991); *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3rd Cir. 1983).

As reviewing courts have explained, NHPA, by its terms, has a narrow reach and is inapplicable in circumstances where the federal action agency lacks legal or factual control over underlying activities. *See Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513-15 (4th Cir. 1992) (Federal Energy Regulatory Commission, in determining that proposal met certain qualifications, did not exercise sufficient control over project to federalize it); *Ringsred v. Duluth*, 828 F.2d 1305, 1308 (8th Cir. 1987) (review and approval by Secretary of Interior of contracts for private construction of a parking ramp did not involve NHPA because the Secretary had no legal or factual control over the ramp).

Relevant case law indicates that the Services' approval of ITPs covering the Forest Practices Program do not constitute an undertaking requiring NHPA compliance because the Services lack authority to meaningfully review both historic preservation and community development goals in this context. The Services do not possess legal authority under NHPA Section 106 or ESA Section 10 to impose requirements on the State to protect cultural resources. Rather, the Services' authority is limited under Section 10 of the ESA to identify necessary and appropriate measures that will further conservation of listed species. This limitation on the Service's authority renders inapplicable the requirements of NHPA Section 106.

Beyond the statutory limitations on the Services' authority, strong constitutional and public policy arguments exist to conclude the Services' approval of the proposed ITPs does not constitute a federal undertaking. In enacting NHPA Section 106, Congress neither contemplated nor intended that state programs would be subjected to programmatic review in the manner contemplated by commenters. Rather, in enacting the NHPA, Congress intended that states would retain the right to develop and implement state historic preservation act programs to forward the objectives of the NHPA. *See* 16 U.S.C. § 470a(b). Subjecting the State's forest practices program to review and potential regulation by the federal government under NHPA Section 106 would conflict with congressional intent that states not be *required* to implement the NHPA, but that states be given the opportunity to voluntarily develop and participate in such programs. This analysis is consistent with Supreme Court precedent holding that the federal government cannot compel state agencies to exercise regulatory authority over private parties to implement federal policies or requirements. *See Printz v. United States*, 521 U.S. 898, 925, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997)(holding that the federal government may neither issue directives requiring states to address particular problems, nor command state officers, or those of their political subdivisions, to administer or enforce a federal regulatory program); *New York v. U.S.*, 505 U.S. 144, 112 S.Ct. 2408 (1992)(holding that Congress cannot compel states to enact or enforce a federal regulatory program).

Even assuming that the Services determine that ITP issuance constitutes an undertaking, the Services need not engage in NHPA Section 106 consultation if the Services determine their activities are of the type that does not have the potential to cause effects on historic properties. *See* 36 C.F.R. § 800.3(a)(1). In addition, if the federal action may result in some effect on cultural resources, but such effects are found to be *de minimis*, the Services need not engage in consultation over the proposed activities. *See Save Our Heritage Inc. v. FAA*, 269 F.3d 49, 63 (1st Cir. 2001).

In the present case, the Services' issuance of ITPs does not have the potential to cause effects to historic properties because such permits will not change or otherwise alter existing State programs. The Forest and Fish Program is currently in place, and is currently being implemented by the State. Issuance of ITPs will not alter this existing program. In addition, as described in the FEIS, adoption of the preferred alternative and issuance of the proposed ITPs will likely result in benefits to cultural resources because protections for historic properties will likely be increased or improved in view of the existing protection provisions incorporated into the current Washington Forest Practices Rules. *See* FEIS at 2-269. Since the federal action will, at most, cause only beneficial effects to historic resources, its effects should be discountable from the perspective of NHPA Section 106.

II. Adequacy of Future Funding in the Context of State Programs

Some commenters suggest that the State has failed to provide sufficient assurances that the proposed conservation plan will remain adequately funded for the duration of the proposed ITPs. *See* 16 U.S.C. § 1539(a)(2)(B)(iii)(requiring the Services to find that the applicant will ensure that adequate funding for the plan will be provided). WFPA disagrees with such comments, and believes the record before the Services more than demonstrates the State's willingness and ability to fund the proposed conservation plan.

As a legal matter, the Services should evaluate the State's willingness and ability to fund conservation plan implementation in light of the State's proven commitment to the development of both the Forest and Fish Program and the related habitat conservation plan. This record of support and funding exhibited by the State provides a strong indicator the State will continue to fund the plan into the future. *See Loggerhead Turtle v. County Council of Volusia County*, 120 F. Supp. 2d. 1005 (M.D. Fla. May 17, 2000). In addition, should the State fail to adequately fund plan implementation, the Services have reserved their rights in the IA to notify the State of shortfalls, to provide the State with an opportunity to cure such shortfalls, and ultimately, to suspend or terminate the ITPs in the event funding shortfalls are not address in a timely manner. These provisions, coupled with the State's performance to date, provide sufficient assurances that the program will remain adequately funded into the future.

III. Minimization and Mitigation to the Maximum Extent Practicable

Some commenters suggest that the proposed conservation plan fails to minimize and mitigate incidental take to the maximum extent practicable as required by the ESA

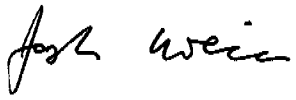
Section 10 implementing regulations, and that the applicant could "afford to pay more." *See* FEIS Response to Comments at 3-4. WFPA agrees with the Services that the ability to pay more is not the primary consideration under ESA Section 10 issuance criteria; rather, the Services must evaluate whether proposed mitigation is "rationally related to the level of take under the plan." *See National Wildlife Federation v. Norton*, 306 F. Supp. 2d 920, 927 (E.D. Cal. February 4, 2004).

Even assuming for the sake of argument that the ESA requires mitigation up to industry's financial breaking point, the record in this proceeding offers sufficient evidence that this point has been reached. The Small Business Economic Impact Statement and associated economic studies developed during the State Environmental Policy Act process demonstrate that the proposed conservation plan will result in significant economic impacts to State economy and the timber industry.[4] The plan imposes stringent stream buffer, road maintenance and stream crossing requirements, and it takes otherwise harvestable trees out of production for the duration of the ITPs. WFPA incorporates these economic studies by reference into this comment letter, and refers the Services to these documents as evidence that the State and the timber industry in Washington have mitigated potential take to the maximum extent practical or feasible.

IV. Summary and Conclusions

WFPA appreciates this opportunity to respond to issues raised in the FEIS and the Services' response to public comments. We commend the State and the Services on their efforts to date, and look forward to final agency actions. Please feel free to contact me if you have any questions regarding these comments.

Sincerely,



Josh Weiss, JD
Director of Environmental Policy
Washington Forest Protection Association

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[4] *See* Perez-Gracia, J. J. Edelson, and K. Zobrist, *Small Business Economic Impact Statement For New Proposed Forest Practices Rules Implementing the Forests and Fish Report,* University of Washington, College of Forest Resources (January 22, 2001). This report concludes that the cost of implementing the forest practices rules associated with Forest and Fish will amount to a 25.6% reduction in current revenue for small businesses and an 18.5% for large businesses in western Washington. In eastern Washington, small businesses will lose 31.0% of their business value by implementing the rules compared to 22.1% for large businesses. In addition to these compliance costs, the value of lost employment resulting from lower timber harvests amounts to nearly $16 million in eastern Washington for the forestry and saw-milling sectors (assumed to mostly impact small businesses) and nearly $7 million for the pulp and paper sectors (assumed to mostly impact large businesses). In western Washington, the losses are over $160 million in the saw-milling and forestry sectors (again assumed to be mostly small businesses) and $123 million in the pulp and paper sectors.